Supreme Court, U.S.
FILED
MAR 7 1996
CLERK

No. 95-1249

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LAWTON M. CHILES, JR., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; UNITED STATES SENATORS CONNIE MACK, BOB GRAHAM, ALFONSE M. D'AMATO, DIANNE FEINSTEIN, AND KAY BAILEY HUTCHISON; UNITED STATES REPRESENTATIVES CHARLES T. CANADY, SAM M. GIBBONS, TILLIE K. FOWLER, JOHN L. MICA, PORTER J. GOSS, PETE PETERSON, DAN MILLER, C.W. BILL YOUNG, E. CLAY SHAW, JR., PETER DEUTSCH, MICHAEL BILIRAKIS, CLIFF STEARNS, BILL McCOLLUM, JIM BACCHUS, KAREN L. THURMAN, MARK FOLEY, SUSAN MOLINARI, GERALD B. SOLOMON, ROBERT K. DORNAN, RANDY CUNNINGHAM, KEN CALVERT, JERRY LEWIS, CHRISTOPHER COX, JAY KIM, STEPHEN HORN, RICHARD POMBO, PHILIP M. CRANE, H. JAMES SAXTON, BOB FRANKS, JACK FIELDS, AND MARTIN FROST; AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: March 7, 1996

CASILLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 202-223-1220

18 pp

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* filing this brief are the Washington Legal Foundation ("WLF"), the Allied Educational Foundation, and a bipartisan group of 36 United States Senators and Representatives from states affected by the federal government's policies with respect to enforcement of the immigration laws. The *amici* believe that the fiscal

consequences of inadequate immigration enforcement have fallen disproportionately and improperly on taxpayers in a small number of states. In the view of the *amici*, state and local governments should not have to shoulder the full financial burden of providing care and assistance to undocumented aliens in this country. The *amici* further believe, for the reasons set forth in this brief, that the federal government's failure to compensate states adequately for these burdens is unlawful.

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in ensuring that the rights of states are fully respected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country.

United States Senators Connie Mack, Bob Graham, Alfonse M. D'Amato, Dianne Feinstein, and Kay Bailey Hutchison and United States Representatives Charles T. Canady, Sam M. Gibbons, Tillie K. Fowler, John L. Mica, Porter J. Goss, Pete Peterson, Dan Miller, C. W. Bill Young, E. Clay Shaw, Jr., Peter Deutsch, Michael Bilirakis, Cliff Stearns, Bill McCollum, Jim Bacchus, Karen L. Thurman, Mark Foley, Susan Molinari, Gerald B. Solomon, Robert K. Dornan, Randy Cunningham, Ken Calvert, Jerry Lewis, Christopher Cox, Jay Kim, Stephen Horn, Richard Pombo, Philip M. Crane, H. James Saxton, Bob Franks, Jack Fields, and Martin Frost are Members of Congress from both parties who are highly concerned with the inadequate enforcement of federal immigration laws. In their view, the legal residents of the states and localities

that they represent have been severely and improperly burdened by the consequences of federal inaction with regard to illegal immigration.

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, the Allied Educational Foundation is dedicated to promoting education in diverse areas of study, and is concerned with the financial impact of illegal immigration upon public education systems.

The *amici* supported Florida's position before the courts below. WLF and many of the other *amici* also participated in support of similar lawsuits filed by the States of California and Texas.

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The virtual abdication of federal responsibility over immigration enforcement, combined with the educational, medical, and law enforcement obligations that Florida and similarly-situated states must assume, has created an unfunded federal mandate of monumental proportions. The constitutionality of this mandate is being tested by numerous states seeking judicial relief that would compel the federal government to fulfill its duty either to enforce the immigration laws adequately or to compensate for the costs incurred as a result of federal nonfeasance. The magnitude of this litigation — in terms of the amount of taxpayer funds at issue, the number of states involved, and its implications for federal-state relations — justifies this Court's review.

2. With respect to Florida's constitutional claim under the Tenth Amendment, the appeals court concluded that any costs assumed by Florida are "not the product of the kind of coercion which violates the Tenth Amendment." Pet. App. A-5. The court below apparently assumed that Florida's expenditures are voluntary, not federally mandated. But federal law *does* require Florida to provide educational services to undocumented aliens. This Court should decide whether the Constitution permits the federal government to force certain states to shoulder a federally-mandated fiscal burden that is exacerbated by the federal government's own failure to carry out its statutory enforcement duties.

ARGUMENT

I. The Issue Presented Is of Nationwide Significance and Is the Subject of Nationwide Litigation

Throughout the history of the United States, immigrants have made invaluable contributions to our society. But illegal immigration has created significant demands on public resources in recent years. These demands are not spread evenly throughout the nation, but rather, are concentrated upon a small number of states, including Florida.

During the first century of the Nation's history, immigrants were numerous, but the legal relationship between the states and the federal government during that period was such that the immigrants created fewer demands on state resources. Most importantly, the states themselves were thought to have an independent authority to regulate immigration — and they did so to protect themselves against the costs of immigrants who might become public charges. *See Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1876).

Not until 1876, in *Henderson*, did this Court hold such state regulations unconstitutional. There, the Court struck down an 1824 New York State statute that required masters of passenger ships to provide either (1) a $300 bond for any foreign passenger "to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief of the person named in the bond for four years thereafter," or (2) a fee of $1.50. 92 U.S. at 267. The Court held that the statutes impermissibly interfered with the authority of Congress "to

regulate commerce with foreign nations." *Id.* at 270-71. The Court in *Henderson* also struck down similar statutes of California and Louisiana. *Id.* at 273, 275.

Today, therefore, the states themselves have no power to enforce federal immigration laws. As a consequence, the fiscal burden upon the states from immigration is greatly magnified by the federal government's failure to enforce its own immigration laws adequately. *See* Florida Compl., ¶¶ 7-11, 40-41; Pet. App. D-2 - D-4, D-14. The district court in this case acknowledged as much, even as it rejected Florida's claims:

> The Court recognizes that the State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. The State of Florida is in desperate need of relief from this overwhelming burden it is being unfairly forced to bear. The Court also recognizes that, as the State of Florida has already sought relief through the political process, the State may have no other method for obtaining relief from this burden should this Court determine that the issue is a political question.

Pet. App. B-23.

As the result of federal law requirements, and the need to protect Florida residents who are lawfully present, the State of Florida must provide costly educational services and other services to illegal aliens without federal

reimbursement. *See* Florida Compl., ¶¶ 49-55, Pet. App. D-18 - D-24. Florida must also expend considerable resources on the apprehension and incarceration of illegal aliens who commit crimes in the state. *Id.*

In response to these federal mandates, the constitutionality of the federal government's failure to provide reimbursement is not just the subject of this action, but of pending litigation brought by states across the country: Arizona,[1] California,[2] New York,[3] New Jersey,[4] and Texas.[5] These states brought suit in recognition of the impossibility of obtaining relief in the national political arena, given that the fiscal burdens from illegal immigration are now borne by only a handful of states. In light of the fact that a total of six states now have challenges pending in five federal courts of appeals, this Court should review the decision below and provide guidance to the lower courts on the issues presented.

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[1] *Arizona v. United States*, *appeal pending* (9th Cir. No. 95-15980).

[2] *California v. United States*, *appeal pending* (9th Cir. No. 95-55490).

[3] *Padavan v. United States*, *appeal pending* (2d Cir. No. 95-6156) (lawsuit brought by state legislators).

[4] *New Jersey v. United States*, *appeal pending* (3d Cir. No. 95-5685).

[5] *Texas v. United States*, *appeal pending* (5th Cir. No. 95-40721).

II. This Court Should Decide Whether Article I and the Tenth Amendment Allow the Federal Government to Force States to Bear the Fiscal Burden Resulting From the Obligation to Provide A Free Education to the Children of Undocumented Aliens

Federal law requires Florida public schools to provide a free education to illegal immigrants. This Court, in *Plyler v. Doe*, 457 U.S. 202 (1982), held that states cannot constitutionally restrict an illegal immigrant child's access to a free public education absent federal authorization. The federal government's failure to limit the flow of illegal aliens into the state means that this unfunded federal mandate imposes a significant cost on Florida taxpayers.

Neither Florida nor *amici* seek in this litigation to challenge this Court's ruling in *Plyler* or to deprive illegal alien children of an education. The question, rather, is one of fiscal accountability. As five Justices in *Plyler* itself suggested, because the federal government has exclusive authority to enforce the immigration laws, it should assume a corresponding responsibility to compensate Florida for the burden that inadequate immigration enforcement has imposed upon Florida's public schools.

The unfunded educational mandate imposed upon Florida by federal law is highly burdensome and unfair to Florida taxpayers. According to a study conducted by the Urban Institute and funded by the U.S. Department of Justice, state and local government expenditures in the 1993-94 academic year averaged $4,363 for one immigrant child. *See* Rebecca L. Clark, Jeffrey S. Passel, Wendy N. Zimmerman & Michael E. Fix, *Fiscal Impacts of Undocumented Aliens: Selected Estimates For Seven States*

89 (1994). The study estimates that the education of children of illegal aliens cost Florida taxpayers $423.9 million in 1993-94. *Id.*

The estimated education costs borne by other affected states are no less dramatic: Arizona, $54.6 million; California, $1.289 *billion*; Illinois, $112.5 million; New Jersey, $146.2 million; New York, $633.8 million; and Texas, $418.9 million. The scale of these costs is unsurprising, given that millions of individuals are illegally present in this country.[6]

The federal government cannot impose such mandates upon a state without offsetting funding. This Court indicated in *New York v. United States*, 112 S. Ct. 2408 (1992), that although the federal government can create incentives for a state to operate a federally-desired program, and can offer grants conditional on the operation of such a program, it lacks the power to hijack state resources unilaterally for its own ends. *See* 112 S. Ct. at 2424, 2428.

In that case, Congress had given New York a choice between accepting ownership of certain radioactive materials or assuming liability for all damages resulting from the state's failure to take possession. The Court

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[6] Two governmental estimates indicate that, as of October 1992, the illegal alien population in the United States was over three million. The U.S. Bureau of the Census has given a range of 3.2 million to 3.8 million; an unpublished estimate from the U.S. Immigration and Naturalization Service (INS) places the size at approximately 3.379 million. *See generally* Clark, Passel, Zimmerman & Fix, *supra*, at 17-29. The Urban Institute study concluded that the INS estimate is the most reliable. *Id.* at 17.

treated this requirement as a forced subsidy, which the federal government could encourage, but could not compel. The Court explained:

> On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy to radioactive waste producers. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

112 S. Ct. at 2428.

The opinion of the lower courts do not specifically address Florida's claim with respect to unfunded educational mandates. Rather, the appeals court concluded across the board that the federal government had not applied coercion, at least for Tenth Amendment purposes, to cause *any* of Florida's expenditures on illegal aliens.

Pet. App. A-5. But that simply is not true, in light of the requirement in *Plyler*.

Neither is it true, as Defendants contended in the court below, that the provision of a free public education to illegal aliens is solely a constitutional requirement rather than a congressional or Executive Branch mandate. The majority in *Plyler* indicated that the states would have more flexibility in limiting the access of illegal aliens to public education if the federal government were to articulate a policy authorizing such limitations. The Court repeatedly indicated that its decision hinged on the lack of a contrary federal policy concerning the education of illegal aliens. "[The] courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens." *Plyler*, 457 U.S. at 224. "[In] the area of special constitutional sensitivity presented by these cases, and *in the absence of any contrary indication fairly discernible in the present legislative record*, we perceive no national policy that supports the State in denying these children an elementary education." *Plyler*, 457 U.S. at 226 (emphasis added).

Thus, the holding in *Plyler* in no way forecloses, and in fact invites, congressional action, including action that would effectively resurrect the same state statute found invalid in *Plyler*. *See* Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. Pitt. L. Rev. 409, 430 (1983). Indeed, in *DeCanas v. Bica*, 424 U.S. 351 (1976), the Court permitted California to regulate the employment of illegal aliens — barring them from working "if such employment would have an adverse effect on lawful resident workers,"

id. at 352 — because Congress had implicitly authorized such measures.

Contrary to Defendants' contention, then, Congress, not the Constitution, has imposed the educational mandate upon Florida. This Court held in *New York* that the coercive imposition of such a mandate without offsetting compensation is unlawful. Whether the mandate is viewed "as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *New York*, 112 S. Ct. at 2429.

Defendants also sought below to avoid the holding of *New York* by relying on *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), in which this Court upheld a federal law requirement that state utility regulators "consider" certain federal rate-making standards. But the Court found no Tenth Amendment violation there because the federal statute required "only *consideration* of federal standards," 456 U.S. at 764, making the requirement "essentially hortatory," *id.* at 770. (Emphasis in original.) The further requirement that the state adjudicate disputes arising under the standards it adopted did not amount to a federally-coerced subsidy, either: the requirement did not "grant any rights beyond those presently accorded by Mississippi law." *Id.* at 769. In upholding the federal program at issue in *F.E.R.C.*, the Court explicitly indicated that its decision "does not purport to authorize the imposition of general affirmative obligations on the States." *Id.* at 769 n.32.

Five Justices in *Plyler* argued that the federal government should share the costs associated with its failure to enforce the immigration laws effectively. Chief

Justice Burger, joined by three other Justices, stated in dissent:

> It does not follow . . . that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.

Plyler, 457 U.S. at 242 n.1. Justice Powell indicated his agreement. *Plyler*, 457 U.S. at 241 (Powell, J., concurring). The four dissenters and Justice Powell accurately noted the jumbled logic of the current system. Only the federal government can enforce immigration laws; if the federal government fails in its enforcement, it should bear the costs of its failure. Otherwise, the states would be forced to bear costs that they are powerless to protect themselves against, an outcome that the five Justices in *Plyler* recognized as absurd.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: March 7, 1996